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CONFERENCE ON EMERGING EDUCATIONAL CHALLENGES FOR LAW IN COMMONWEALTH ASIA AND AUSTRALASIA:

The Implications for Legal Education

BILINGUALISM IN LEGAL EDUCATION - A MALAYSIAN EXPERIENCE.

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Bilingualism in Legal Education - A Malaysian Experience

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A. INTRODUCTION

i. An Outline

The implementation of a bilingual policy at the Faculty of Law, University of Malaya is part of the country's wider National Language Policy which was adopted immediately after independence. The concept of a National Language in general and the elevation of a language as the country's national language in particular, cannot be said to have been successfully and effectively implemented if a country's legal system and the administration of justice continue to be in a language which is foreign to the masses. The process of change from English to the National Language is not a process peculiar only to the law and the legal profession as the National Language Policy traverses all sectors and professions. However the peculiarities of law and the legal profession, and the unique symbiotic relationship between law and language particularly in a legal system which is based on the common law, make the

problems faced by the Faculty of Law particularly acute. The situation is further aggravated by the stubborn insistence of some politicians that whatever problems faced are indicative and typical of the established colonial sentimentalism of members of a legal profession whose mecca continues to be England even decades after independence. Problems voiced about the difficulties in and doubts raised about the wisdom of, teaching law in the National Language were seen as nothing more than a reflection of the arrogance of a profession which is till today still dominated mainly by those who are foreign trained.

In this paper an attempt is made to share the experiences, the challenges and the problems faced by the Faculty of Law at the University of Malaya in teaching law within a common law legal system in a language other than English. It is the writer's contention that while the language in which the law in a common law legal system is communicated or transmitted can be changed to a language other than English, until and unless that nation is ready and willing to make a complete break with the common law, the change would have been effected at a very high cost.

ii. The Malaysian Legal System - a brief historical background

It is said that the 'Malaysian legal system has not been plucked out of the sky. It is the product of our experiences over the centuries.¹ These experiences included over 150 years of British influence - both direct and indirect. The landing of Sir Francis Light in Penang in 1786 followed in 1807 by the granting of the First Charter of Justice to Penang saw the beginnings not only of the influence and application of English law in the country but equally significantly, the beginning of the process of adoption of the English language as the language not only of the law and of the courts but as the language of the entire legal system.²

While the other Malay States were not British colonies as such and hence English law was not formally brought in until much later, principles of English law were conveniently applied by British administrators and by

¹ Tun Mohamed Suffian. An Introduction to the Legal System of Malaysia. Penerbit Fajar Bakti, 1988, p.1.

² The privy Council decision in 1872 in Ong Cheng Neo v Yeap Cheah Neo (1872) 1 Ky 326 removed all doubts about, and formally endorsed, the application of the English Law in Penang.

locals who were English educated whenever an issue could not be resolved by the use of local customary or religious laws. The Federated Malay States³ formally provided for the application of English law in the 1937 Civil Law Enactment. The Enactment was extended in 1951 to the other remaining Malay States⁴ and was replaced in 1956 by the Civil Law Ordinance which provided for the application of English Law throughout the Federation of Malaya.

In the Borneo States of Sabah and Sarawak, English law was formally brought in by the Sarawak Application of Laws Ordinance 1949 and the Sabah Application of Laws Ordinance 1951, respectively.

The Civil Law Ordinance 1956 which was revised in 1972⁵ and is now the Civil Law Act, 1956, continues the application of English Law throughout the country till today. Section 3 of the Act provides that in the absence of any written law in force in Malaysia, the courts in West Malaysia shall apply the common law of England and the

³ Which comprised of the states of Perak, Selangor, Negeri Sembilan and Pahang.

⁴ Kedah, Perlis, Kelantan, Terengganu and Johore

⁵ The 1956 Ordinance was modified and extended to apply to the States of Sabah and Sarawak by PU(A) 424/1971 and revised in 1972 as laws of Malaysia Act 67.

rules of equity as administered in England on 7.4.1956. The courts in Sabah and Sarawak shall, in a similar situation apply the common law of England, rules of equity and statutes of general application as administered or in force in England on 1.12.51 and 12.12.49 respectively.

In relation to commercial matters, section 5 of the Act provides that in the absence of local statutes, in all the states of West Malaysia except Penang and Malacca, the law to be applied shall be the law as administered in England on 7.4.1956 while for the states of Penang, Malacca, Sabah and Sarawak the law to be applied shall be the law as administered in England in the like case at the corresponding period.

The continued domination by the English of the politics and administration of the country prior to independence coupled with the formal adoption of English law served as the catalyst for the adoption of English as the language of the legal system. In the words of a former Lord President⁶:-

⁶ Mohamed Salleh bin Abas, Selected Articles and Speeches on Constitution, Law and Judiciary Malayan Law Publishers 1984, p.47.

[T]he years after the Second World War saw the progressive erosion of the official use of the Malay language which had to give way for the sake of convenience and expediency to the supremacy of the English language, a condition necessitated by the accelerated adoption of the British common law system and the system of administration.

iii. Bahasa Malaysia⁷ as Malaysia's National Language - Its Constitutional Legal Framework

The search for a national identity coupled with nationalist desires to sever certain more ostensible links with past colonial masters inevitably forced most emerging independent nations to adopt a national language of their own. The multi-ethnic multi-religious demographic structure of Malaysia makes the adoption of a national language an absolute imperative. A national language is seen as the singularly most important tool in the nation's efforts to achieve unity as a language pervades the social and political fabric of any society. The adoption of a

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The Constitution uses the term Malay Language, (Art 152(1)). But generally, Bahasa Malaysia (which literally means Malaysian Language) is now the official and more popularly used term as Malay Language implies that it belongs to the Malays. The term Bahasa Malaysia dissociates the language from any particular ethnic group.

National language is also seen as an important step in establishing a new nation's identity.

The ability of an emerging nation to conduct its affairs in a language of its own, distanced and dissociated from the language of past colonial masters is often seen as one of the more tangible indicators of the nation's entry into adulthood. More patriotic nationalists may even regard such ability as indicative of the fact that the country has achieved not merely de jure independence but also de facto independence.

It was perhaps in the light of some, if not all, of the above considerations that the framers of the Malaysian Constitution included therein Article 152(1) which provides:

The National language shall be the Malay language and shall be in such script as Parliament may provide:

Provided that -

- a) no person shall be prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and
- b) nothing in this clause shall prejudice the right of the Federal government or any state government to preserve and sustain the use and study of the language of any other community in the Federation.

Apart from Clause (1) of Article 152, clauses (3), (4) and (5) are of particular importance for the purpose of this paper.

Clause (3) reads:-

Notwithstanding the provisions of clause (1) for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, the authoritative texts-

- a) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament, and
- b) of all Acts of Parliament and subsidiary legislation issued by the Federal government,

shall be in the English language.

Clause (4) reads:-

Notwithstanding the provisions of clause (1) for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, all proceedings in the Supreme Court or a High Court shall be in the English language.

Provided that if the Court and counsel on both sides agree, evidence taken in the language spoken by the witness need not be translated into or recorded in English.

Clause (5) reads:-

Notwithstanding the provisions of clause (1) until Parliament otherwise provides, all proceedings in Subordinate Courts, other than the taking of evidence shall be in the English language.

iv. The National Language Acts 1963/67

Article 152 of the Constitution remained the only provision regarding the National Language until 1963 when the first National Language Act⁹ was passed. Although this Act was passed because it was felt that the 'necessary legislation must be drafted ... as early as possible to implement the provisions of Article 152',¹⁰ the Act of 1963 did not significantly affect the use of English in the judicial and legal fields. The Act preserved the status quo of the English language as a language of the law and of the courts,¹¹ and hence did not encourage the use of the National Language in a constructive or meaningful way.

⁹ No. 10 of 1963

¹⁰ A motion tabled by Dato' Onn bin Jaafar in the Dewan Rakyat (House of Representatives) on 14.12.59. Federation of Malaya Dewan Rakyat Votes and Proceedings First Session, Vol. 1, p. 113.

¹¹ S.6 of the Act provided that nothing in the Act should affect the provisions of the proviso to clause 1, and clauses 2, 3 and 4 of Article 152 of the Constitution.

More detailed provisions were however introduced by the National Language Act of 1967.¹² Even so, the importance and pervasive influence of the English language in the judicial and legal spheres continued to be recognised and was in fact re-emphasised by numerous provisions in this Act. Section 4, for instance, provides that the Yang Dipertuan Agong¹³ may permit the use of English language for such official purposes as may be deemed fit.

Section 6 provides that the texts of all Bills, amendments thereto, all Acts of Parliament, Enactments, Ordinances and Subsidiary legislation shall be in the National language and in the English language. The National language texts are to be authoritative texts unless otherwise prescribed by the Yang Dipertuan Agong.

Section 8 was perhaps the most controversial. It provided that all proceedings (other than the giving of evidence by a witness) in the Federal Court, the High Court or any subordinate court shall be in the National Language or in the English language or partly in the National

¹² No. 7 of 1967. The National Language Acts of 1963 and 1967 were consolidated in 1971 as the National Language Acts 1963/67, Laws of Malaysia, Act 32.

¹³ The Supreme Head of the Federation.

language and partly in the English language. A proviso thereto allowed the court, either of its own motion or on the application of any party to any proceedings and after considering the interest of justice in those proceedings, order that the proceedings shall be either wholly in the National Language or in the English language.

The then Prime Minister¹⁴ in justifying Section 8 of the 1967 Act gave three reasons why that section continued to allow the use of English in the courts.¹⁵ The first, perhaps the most over-used excuse even till now, is the fact that the lawyers and judges were not yet proficient in the language. The second was the fact that most of the statutes were in English and had yet to be translated to Bahasa Malaysia. The third, was the interest not only of clients but of justice. In this respect the Honourable Prime Minister quoted Pascal:

"Justice and truth are two points of such exquisite delicacy that our coarse and blunted instruments will not touch them accurately."

¹⁴ Tun Abdul Razak bin Hussein, the Second Prime Minister of Malaysia.

¹⁵ Malaysia, Dewan Rakyat Parliamentary Debates 3rd Session Nos.20-49, 1967 Cols.5999.

Explicit in the third reason given by the Honourable Prime Minister was the recognition of the inadequacy of the National language as it had hitherto developed, to replace the English language as a language of the courts.

The provisions of S.8, however were regarded by many as being the main if not the only stumbling block in the way of the successful implementation of the National Language Policy in the courts. From a political perspective section 8 was seen as extremely insulting for the national pride. The government, like the framers of the Constitution, were seen to have again succumbed to the pressure from members of the judiciary and the legal profession who, at that time, all being western trained, were deemed to be 'western oriented sceptics'. It was yet another evidence of the government 'backing off' in the full implementation of the National Language Policy.¹⁶ Members of the legal profession, (all of whom were foreign trained until 1975 when the first batch of students from the Faculty of Law, University of Malaya, graduated) found S.8 to be a convenient and useful security blanket and therefore most saw no urgency in mastering Bahasa Malaysia.

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Machado and Said, 'The Malaysian Legal Profession in Transition' in Lawyers in the third World: Comparative and Developmental Perspective (Dias, Luckham, Lynch and Paul - Eds.) International Centres for Law in Development, New York, p 268.

It is however submitted that the inclusion of clauses (2), (3), (4), (5) and in Article 152 of the constitution and of S.8 in the National Language Act 1967, in fact reflected a realisation by the framers of the constitution and the government that while the language of the court or the language in which the law is communicated may be changed with a stroke of the pen, the real language of the law is inextricably linked to the structural foundations and origins of the legal system. One suspects that it reflects an underlying awareness that in a legal system which is almost totally based on the common law the English language is more than a mere tool; it in fact provides the flesh and colour to the bare bones of the law.

In any event, politicians, as always had the final say. S.8 of the National Language Act of 1963/67 was amended in 1990¹⁷ S.2 of the Amendment Act amends S.8 of the 63/67 Acts. The new S.8 now reads:

All proceedings (other than the giving of evidence by a witness) in the Supreme Court, the High Court or any subordinate court shall be in the national language.

Provided that the court may either of its own motion or on the application of any party to any proceedings and after considering the interest of justice in those proceedings order that the

proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

B. THE FACULTY OF LAW, UNIVERSITY OF MALAYA AND ITS BILINGUAL POLICY

i. The Objectives of the Faculty

The Faculty of Law, University of Malaya which was established on 21.4.1972, is the oldest Law Faculty in Malaysia.¹⁸ Prior to 1972, Malaysians wishing to practice law had to qualify as a Barrister in England. In 1957, when the University of Malaya in Singapore (now the National University of Singapore) started offering the LL.B degree, Malaysians (or more aptly, Malaysians at that time) could also study law in Singapore.

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Although the School of Administration and Law in the MARA Institute of Technology was already conducting teaching courses to prepare students for the London External LL.B even before that date. At present there are three universities offering the LL.B degree namely, the University of Malaya, the International Islamic University and the National University of Malaysia. The MARA Institute of Technology offers the Advanced Diploma in Law which is recognised as the equivalent of the LL.B.

After the setting up of the University of Malaya in Kuala Lumpur, in 1962, there was increasing pressure for the setting up of a local law faculty - particularly after Singapore left Malaysia in 1965. Given the importance of law and legal education and the far reaching influence of the legally trained in charting the political and social destiny of a new nation, the nationalist desire to produce 'home-grown' lawyers is indeed extremely understandable.

The founding Dean of the Faculty of Law identified 5 reasons for the setting up of the Law Faculty, viz:-

1. the need to increase the number of Malays and Bumiputra¹⁹ of Sabah and Sarawak in the legal profession.
2. the need to encourage the use of Bahasa Malaysia in the teaching and practice of law.
3. the need to give greater emphasis to the laws in Malaysia.
4. the need to have more legal material and publications in Malaysia, and
5. the need to encourage postgraduate studies and research.

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This Bahasa Malaysia term which literally means "sons of the soil" is now used to refer to the Malays and other natives and to distinguish them from migrant races such as the Chinese and Indians.

According to the report of the Board of Studies on Law,²⁰ the task of the Faculty was to train legally qualified persons not only for the legal profession and the Judicial and Legal Service but also for administrative positions in government and in business.²¹ Further the Faculty was required to train legally qualified men and women who would also be proficient in Bahasa Malaysia. The Report in fact regarded the institution of a Faculty of Law in Malaysia as a necessary step for the implementation of the use of Bahasa Malaysia in the courts and the legal departments.²²

The Faculty of Law, University of Malaya adopted and modified the curriculum that was already established in the Faculty of Law at Singapore which was based on the Braddell-Allen Report.²³ The modification was necessitated by the fact that the newly established Faculty was given an extremely important role to play within the Malaysian socio-political set-up.

²⁰ Report of the Board of Studies on Law, University of Malaya, Nov 1971.

²¹ Ibid. para 11(6)

²² Ibid. para 11(3)

²³ Ahmad Ibrahim, 'The Teaching of Law in Malaysia' Paper presented at 10th Asian Law Conference 1987.

The above objectives mandate that the Faculty not only Malaysianise and de-elitise legal education to make it available to more Malaysians,²⁴ it has also in the process to provide such education in the National Language. The Faculty had to ensure that as a National Language Bahasa Malaysia is given a prominent if not pivotal role in the teaching and training of lawyers. Only then it was reasoned, could Bahasa Malaysia be expected to slowly replace the English Language as the language of the courts in particular, and of the legal system in general. This is because as far as nationalist politicians were concerned the foreign training of lawyers and consequently their elitism and lack of proficiency in the language is the one and only stumbling block in the way of the wider use of Bahasa Malaysia in the courts and other legal fields.

An extremely heavy responsibility was shouldered upon by the founding members of the Faculty. The expectations were also high - not only from politicians who were anxious to be seen to be implementing the National Language

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Prior to the establishment of the Faculty legal education which was not available locally, was confined only to the fortunate few - fortunate to be English educated and fortunate enough to be born to wealthy parents or to be able to obtain the extremely limited number of scholarships from the government and other bodies.

Policy effectively but from those involved in the administration of justice.

Two social scientists who researched on the Malaysian Legal Profession in Transition observed:²⁵

The dominant Malay political elite is bent on converting the language of the court to Malay. For practical reasons they have backed off on this several times, and they may continue to do so for a while, but we believe that this will inevitably occur. The entry of the locally trained lawyers into the profession will probably hasten the change. A great many of the current members of the profession are not proficient in Malay. [University of Malaya] Law Faculty students are however receiving a bilingual education and many, but not all will be able to work in Malay.

In a paper written in 1975 a senior judge observed²⁶

"[I] think there is a need to work towards progressive use of the National Language in our system of administration of justice. I recognise that at the moment it is not possible to use the National Language as a great deal in the administration of justice and the corpus of our law is bounded up in the English language volumes of legal reports and the majority of our legal

²⁵ Machado and Said, 'The Malaysia Legal Profession in Transition, in Lawyers in the Third World: Comparative and Developmental Perspective (Dias, Luckham, Lynch and Paul Eds.) International Centre for Law in Development. NY, pp.268-269.

²⁶ Mohamed Sallen Abas, "Problems facing the Administration of Criminal Justice in Malaysia" - Paper presented at the Third Malaysian Law Conference 1975, 13-15 Oct. 1975.

community is not proficient in the National Language. A certain landmark will be achieved when the University of Malaya will produce their law graduates proficient in both English and National Language in later years."

ii. The Adoption of a Bilingual Policy

Inspite of the clear responsibilities placed upon the Faculty to play its role in the implementation of the country's National Language Policy, the Faculty of Law began its first three years of existence using English as the medium of instruction. The Faculty only seriously undertook the gargantuan task of 'training legally qualified men who are also proficient in Bahasa Malaysia' when it entered its fourth year of existence, i.e. in the 1975/76 academic year. In that year all lectures for First Year were given in Bahasa Malaysia. Exceptions were made only when a particular subject was taught by an expatriate - in which case supplementary seminars in Bahasa Malaysia would be given by local lecturers. All tutorials were conducted in English. The first batch of students under this Bilingual Policy graduated in 1979. This Bilingual Policy continues till today.

Arising out of the special tasks which the Faculty had to discharge and the adoption of a Bilingual Policy, a

special feature of the Faculty of Law's curricula from its inception till today is the importance placed on the teaching of languages, namely English and Bahasa Malaysia. The course for the LL.B degree is made up of (a) language courses and (b) academic courses. A candidate shall only be deemed to have passed the examination in each of his first three years if he had passed not only the examination in the academic courses but also satisfied the years's language requirement.²⁷

A student is required to do one language course throughout the first three years of his studies. Which of the two languages he is required to take depends on the results of two language proficiency tests which he has to take upon his entry into the Law Faculty. He is required to take the language that he is weaker in. In the first two years, a student who has done remarkably well in both language tests can be exempted from the language course. In the third year however, no exemptions are allowed.

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University of Malaya, Bachelor of Laws Act XXX, Part 1.

C. USING BAHASA MALAYSIA TO EXPRESS THE COMMON LAW ; ITS LIMITATIONS

i. Lack of Bahasa Malaysia Legal Terminology

It has to be emphasised that in conducting lectures in Bahasa Malaysia, the lecturers at the Faculty of Law are attempting to use the language to express ideas, concepts and legal principles which are not our own but which were developed, nurtured and in fact flourished in the English language. Hence the question is not merely the adequacy of Bahasa Malaysia as a vehicle for imparting local legal knowledge but rather its adequacy to be used for expressing legal ideas, and concepts which are foreign. Difficulties that are faced therefore cannot be seen as merely reflecting the weakness of the language per se. Bahasa Malaysia has been used to express Malay legal concepts long before the arrival of the British.²⁸

To see the problem as a mere linguistic problem is both naive and simplistic. The law teacher is faced with

²⁸ Well known Malay codes which were in existence included the Undang-Undang Laut Melaka (Maritime Code of Malacca), Undang-Undang Sembilan Puluh Sembilan Perak (Ninety Nine Laws of Perak) and Undang-Undang Johor (Laws of Johore)

problems like the lack of legal terminology because Bahasa Malaysia is used for something it was not meant to do - to express the English man's values, ideas and concepts. The law teacher is expected to use Bahasa Malaysia (with which he is fairly familiar) to express the 'laws of someone else's grandfather.' It is not unlike asking an oriental to use oriental ingredients and utensils to prepare roast beef. If the product is hardly passable as roast beef it is not because there is anything wrong with the ingredients and utensils per se, only that they are meant for cooking oriental cuisines.

In the early days the problem of finding precise Bahasa Malaysia equivalents to 'highly sophisticated legal terms imported from western legal system' was made more difficult by the fact that in the years immediately after the implementation of the Bilingual Policy, all the lecturers in the Faculty of Law were either foreign trained or were the products of the Faculty before the adoption of the policy. Being themselves unfamiliar with legal Bahasa Malaysia, the lecturers had by a process of 'trial and error' to make up their own Bahasa Malaysia terms when none could be found.

This problem is less acute now for a number of reasons. While a Bahasa Malaysia legal dictionary has yet to hit the market, the Dewan Bahasa dan Pustaka (the government National Language and Literary Agency) has produced a number of registers on English-Malay legal terminology. The Supreme Court has also come out with its own version. These do not however solve the problem completely. Sometimes the Bahasa Malaysia terminology changes with every new edition. Furthermore a fair number of these newly-created Bahasa Malaysia words are in fact English words with the spellings changed. For instance 'caveat' is kaveat, 'domicile' is domisil and 'firm' is firma.

The Faculty of Law at the University of Malaya like all other professional faculties in the country faces a high rate of academic staff turn over. The average age of the Faculty seems to get younger by the year. One (perhaps the only) positive effect of this is that it has helped in the Faculty's implementation of the Bilingual Policy. The new and younger breed of academic staff, most of whom are post-Merdeka children, are themselves the product of the National Education Policy. Most if not all, had done their LLBs at the university and had been at the receiving end of the Faculty's Bilingual Policy. While Bahasa Malaysia may

not be the mother tongue of some of them, this young breed of academics have almost perfected the art of teaching the common law in Bahasa Malaysia. Some of these young staff members have also contributed significantly by translating certain English law books into Bahasa Malaysia.

At the same time, the more senior staff who though not originally trained in English, have, over time improved their command and use of Bahasa Malaysia considerably.

ii. Lack of Legal Literature

The inadequacy of legal terms in Bahasa Malaysia can be the cause or the result of, the lack of legal literature in Bahasa Malaysia - the chicken and egg story. This is clearly illustrated by looking at the holdings of the Law Library at the Faculty of Law, University of Malaya which is generally regarded as the best in the country. While all the lectures by locals have been conducted in Bahasa Malaysia since 1974, today 18 years later, Bahasa Malaysia books make up only about 1% of the Law Library's total

acquisition of 70,000 books.²⁹ The reasons for this pathetic state of affairs are easily identifiable.

Legal education being in a stage of comparative infancy in Malaysia, the tradition of legal research and writing whether in English or in Bahasa Malaysia has yet to establish a firm foothold. Unlike writing for the public, academic legal writing requires adequate research and sufficient scholarship. Those experienced enough to have these skill, interest and dedication are mostly those trained in English and would find it easier to write in the English language.³⁰

Even the products of the Bilingual Policy of the Faculty of Law who should be better equipped to write in Bahasa Malaysia often choose to write in English first,

²⁹ The 1% includes books from Indonesia. Information obtained from the Librarian at the Faculty of Law, University of Malaya.

³⁰ The founding Dean of the Law Faculty, Prof. Ahmad Ibrahim who is now Dean of the Kulliyah of Laws at the International Islamic University is by far the most prolific legal scholar in Malaysia. To date he has published about 20 law books of which only one, Sistem Undang-Undang di Malaysia which he co-authored with Ahilemah Jonet, is in Bahasa Malaysia. See Shaikha Zakaria, 'The Legal Literature of Malaysia' in Hooker (Ed) Malaysian Legal Essays, Malayan Law Journal, Pte. Ltd., 1986 pp 370-372, Nik Abdul Rashid, 'Pengenalan: Ahmad Ibrahim' in Makalah Undang-Undang Menghormati Ahmad Ibrahim (Legal Essays in Honour of Ahmad Ibrahim) Fac. of Law, UM 1988 p.xxvi.

and, if at all, perhaps later to translate their writings into Bahasa Malaysia. It is not only because the primary and secondary sources are mainly in English, it is also because of 'selfish' academic and economic considerations. A good English manuscript can attract a reputable international publisher and possibly a review in an international journal. A book published in English by an international publisher attracts both foreign and local demands. Readership will not be limited to the shores of Malaysia. Monetary considerations aside, this enhances the author's academic standing and reputation.

Furthermore, until recently, except for the government owned Dewan Bahasa dan Pustaka and the local University Presses, few commercial publishers find publication of law books in Bahasa Malaysia commercially viable. The Dewan Bahasa dan Pustaka, like all government agencies, have their fair share of red tape and hence publishing with them although in some sense more commercially attractive³¹ requires patience and persistence. The use of over-zealous editors who are not trained in the law but who persist in

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In their effort to encourage the writing of academic books for institutions of higher learning, the Dewan gives an outright grant of \$500/= to potential writers with almost 'no strings attached', upon submission and acceptance of a proposal. Royalties at 15% are paid to authors upon publication of the books.

correcting what they perceive as mere linguistic flaws, at the expense of legal precision and accuracy, adds to the frustration of the writers.

Due to the above factors, till today there are only a handful of legal textbooks in Bahasa Malaysia for use at institutions of higher learning. From year one to year four an undergraduate at the Faculty of Law has to take fourteen compulsory subjects (excluding language).³² There are textbooks or related books in Bahasa Malaysia in only three of these subjects.³³ Even so these books were

³² Year I - Introduction to Malaysian Legal System
Law of Torts
Law and Society
Family Law

Year II - Criminal Law
Constitutional Law
Land Law
Law of Contract

Year III - Law of Association
Law of Evidence
Equity and Trust

Year IV - Jurisprudence
Civil Procedure
Administration of Criminal Justice

³³ Mimi Kamariah Majid : Pentadbiran Keadilan Jenayah di Malaysia, (Administration of Criminal Justice), University of Malaya Press 1990, Ahmad Ibrahim and Ahilemah Jonet, Sistem Undang-Undang di Malaysia (Malaysian Legal System), Dewan Bahasa dan Pustaka and Suffian, Lee and Trindade (Eds.). Perlembagaan Malaysia: Perkembangannya 1957 - 1977 (Malaysian

not originally written in Bahasa Malaysia, they are translated and revised from the English version by the authors themselves³⁴ - an extremely tedious and painstaking exercise which one believes was only done out of a writer's sheer commitment to their students coupled perhaps with a sense of frustration with the state of Malaysian legal literature in general and Malaysian legal literature in Bahasa Malaysia, in particular.

The number of articles in Bahasa Malaysia legal journals is even more limited. Until a few years ago there was simply no outlet for Bahasa Malaysia articles except for the Faculty of Law's own Journal of Malaysian and Comparative Law which has been publishing token articles in Bahasa Malaysia from its first publication in 1974.

The first all Bahasa Malaysia legal journal, Kanun, which was first published in December 1989 by the Dewan Bahasa dan Pustaka, is intended to provide reports of judgements delivered in Bahasa Malaysia or translations of

Constitution: The Development 1957 - 1977), Fajar Bakti, 1983

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With the exception of Ahmad Ibrahim and Ahilemah Jonet, Sistem Undang-Undang di Malaysia which was first published in Bahasa Malaysia in 1985 and was followed by its English version in 1987.

more important judgements which are delivered in English.³⁵ The journal also carries legal articles written in Bahasa Malaysia. While the publication of this journal is undeniably a positive step in the right direction, it is still in its infancy and it will take time for it to be as widely accepted and as well regarded as the English language Malayan Law Journal. At present the small readership of Kanun coupled with the fact that it has yet to establish itself as a journal of good academic repute seem to have made some academics hesitant about publishing their articles in that journal. Perhaps when more judgements are delivered in Bahasa Malaysia in the near future and with greater experience coupled with the ability to be published more regularly,³⁶ Kanun will be able to obtain wider readership and will therefore be able to attract more articles for publication.³⁷

³⁵ Laporan Kajiselidik Penggunaan Bahasa Melayu dalam Bidang Kehakiman dan Undang-Undang (Report of Survey on the use of Malay language in the Judicial and Legal Fields). Jilid I : Penemuan dan Analisis Kajian. Dewan Bahasa dan Pustaka, p.378-379.

³⁶ Kanun is now published every quarterly. The Malayan Law Journal on the other hand is published fortnightly.

³⁷ There are other journals that publish Bahasa Malaysia judgments and articles such as Jurnal Hukum which is published by the Islamic Affairs Section of the Prime Minister's Department, but it concentrates on cases in the Syariah Court and articles pertaining to Syariah Law.

iii. Lecturing in Bahasa Malaysia : The Lecturers' Problems

While most if not all local lecturers now deliver their lectures in Bahasa Malaysia fluently, most would also readily admit that given a choice they would rather deliver their lectures in English. This is the case even with lecturers whose mother tongue is Bahasa Malaysia. A common complaint about delivering lectures in Bahasa Malaysia is that a lecturer is usually confined by his lecture notes. Discussions are either avoided or sometimes carried out partly in English. This cramps the lecturers' style and most feel that they cannot give their best by delivering lectures in Bahasa Malaysia.

In a research paper written by a final year student in 1980, it was observed:³⁸

"In compliance with the policy of the Faculty the lecturer struggles valiantly to translate his lectures and then endeavours to deliver it in Bahasa Malaysia. Some of the lecturers are less fluent in the National Language. This results in ineffective lectures which might otherwise have been brilliantly delivered had they been in English."

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Koid, SL ' Legal Education in Malaysia - A Critical Analysis' Unpublished Project Paper, Fac. of Law, UM 1980 pp 37-38.

A good lecturer is not one who can make good stenographers out of his students. He is one who is not merely able to impart knowledge but is also able to capture the students' interest and imagination and to incite the students to think about the topic he is lecturing. Until and unless a lecturer is fully conversant in the law as well as in the language in which he is delivering the lecture, the above is indeed a tall order.

Additionally, arising out of the inadequacy of Bahasa Malaysia legal terminology and the lack of Bahasa Malaysia legal literature - lecturers spend precious hours translating material into Bahasa Malaysia for the purpose of the lecture - time which certainly could be better spent in substantive research and writing. This leaves the young lecturer in particular, with very little time for his research and writing and is usually one of the factors which prevents him from even trying to move into new areas of teaching and reaserch.

D. AN ASSESSMENT OF THE PRODUCTS.

It was observed in 1975 that³⁹

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Legal Education in a Changing World : Report of Commission on Legal Education in Developing Countries, International Legal Centre, New York 1975 p.89.

Little is known about the effects of studying law in an indigenous language on the learning process. It may well be that students learn more quickly and more efficiently by studying in their own first language and are able to grasp some matters much more easily by this means. On the other hand, it may also be, particularly in relation to conceptual problems, that it is harder for them to grasp and understand the implications of what they are learning without recourse to a foreign language.

If the experience of the Faculty of Law at the University of Malaya is anything to go by, the second part of the above observation seems to be the more apparent effect of teaching law in an indigenous language.

In assessing the products of the Faculty of Law's Bilingual Policy, it may well be necessary to reiterate that the main reason for the adoption of such a policy was to produce legally qualified persons who would provide the necessary impetus for the use of Bahasa Malaysia in the practice of the law. Given this background, the first question that has to be asked is 'Has the adoption of a Bilingual Policy' been successful in this respect? The answer to that is a definite yes! Since the adoption of the Bilingual Policy in 1975, the Faculty has now produced thirteen batches of graduates totalling over 1,000. Some of these graduates are now Judges of the Sessions Courts, Senior Federal Counsels and Deputy Public Prosecutors. Those who are not in the government service are either in

legal practice or in the corporate sector. Except perhaps in the corporate sector where English is still the dominant language, these graduates have displayed an impressive ability to use Bahasa Malaysia either orally in the courts or in writing, whether it be in drafting a document or a new bill. Graduates of the Faculty were amongst the earliest members of the Subordinate Courts to write judgments in Bahasa Malaysia. A large proportion of the legal officers in the Drafting Division of the Attorney General's Chambers, are also graduates of the Faculty. This Division is responsible for drafting new bills in Bahasa Malaysia and translating existing ones.⁴⁰ The fact that the ability to speak and write legal Bahasa Malaysia is not confined to those of Malay origin is further testimony of the Faculty's success.

Now that the accolades have died down and the ability of our graduates to use Bahasa Malaysia is a fact that is taken for granted, the question that has to be asked is - Is there a 'price' for this success? If there is, is the 'price' one that the Faculty or the graduates in particular and society in general can afford? The term price here is

⁴⁰ Wan Arfah Hamzah, 'Bahasa Malaysia dalam Bidang Undang-Undang - Pencapaian dan cabaran' in Makalah Memperingati Ahmad Ibrahim (Essays in Honour of Ahmad Ibrahim) Faculty of Law, University of Malaya 1988.

not used in the monetary sense but rather, have we sacrificed something else for this very tangible success for which the Faculty is rightly proud of? It is the writer's contention that there is a price and it is a price which the Faculty, its graduates and society at large should not continue to pay any longer.

The National Education Policy which made Bahasa Malaysia the medium of instruction in schools⁴¹ means that the 'raw material' which the Faculty gets for the 4-year process of transforming them into legally qualified persons are all well versed in Bahasa Malaysia but would only have studied English as a second language. While those in the urban schools may be more fortunate in that English is commonly used informally either with friends or family (particularly because in urban schools, the students are from various ethnic groups) those from the rural areas

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This policy was first implemented in 1970 when all subjects (except English) taught in Standard One in all government schools were taught in Bahasa Malaysia. Prior to that, government schools were either Malay or English medium schools. The first batch of students under the National Education Policy entered the universities in the 1983/84 academic session. Prior to this, the Law Faculty in particular had a higher proportion of English medium students than Malay medium students - for example in the 1975 intake, 66% were from English medium while in the 1976 intake, 74% were from the English medium. - See Koid SL, 'Legal Education in Malaysia. A Critical Analysis', Unpublished Project Paper, Faculty of Law, UM 1981 p.36.

would hardly have spoken a word of English outside their English classes. The Faculty's insistence that all those entering the law schools have at least credits in both Bahasa Malaysia and English in the Sijil Pelajaran Malaysia (School Certificate of Malaysia - which is equivalent to the O Levels) have not prevented those weak in English from getting through the net.

The result is that there are generally two categories of students entering the Faculty - those who are truly bilingual and those who are generally monolingual but who have studied English as a language and had managed to obtain a credit for it.

It is the writer's view that due to a variety of constraints the implementation of the Bilingual policy at the Faculty of Law has not only failed to bridge the gap between these two groups but has unfortunately widened and reaffirmed it.

What is the effect of giving lectures in Bahasa Malaysia? While students who have a sufficient command of English to enable them to read primary and secondary sources in English treat the lectures for what they are - ie. a discussion by the lecturer of the more important

areas in the subject which must be complemented by further additional readings, those who find it difficult to read and understand the materials which are almost all still in English, will regard the lecture notes as the main source of information on the subject and read only other materials which are absolutely necessary. This is partly because of time constraints - while some of their friends need perhaps under an hour to understand an important decision, they may, because of their poor grasp of the English language, take two or perhaps three hours. Such a student is bound on reading materials in English to have to struggle with additional terms which his lecturer may not have explained in Bahasa Malaysia. Out of desperation he may even resort to using simple books in Bahasa Malaysia on the subject which are either meant for the laymen or which are translations (by those trying to make a quick buck out of the students' desperation) of English 'nutshells' from England which give the misleading impression that because they are in Bahasa Malaysia, they deal with the law in Malaysia. If the book happens to be on a subject where there is a clear divergence between the law in Malaysia and that in England, this can be particularly hazardous.

Hence already at a disadvantage even though the lectures are delivered in Bahasa Malaysia, the students

then attend the tutorials and face perhaps the very same lecturer who, having delivered lectures on the subject in Bahasa Malaysia now conducts the tutorial totally in English. While the truly bilingual students who, in most instances would also be more widely read, would have no difficulties discussing the tutorial problems, the students who are not fully conversant in English, and generally less widely read, would attempt to orally translate their lecture notes whenever questions are directed at them. In addition to worrying about the ideas that have to be put across the students have to worry about how to put across, such ideas in English. This inevitably, inhibits the students concerned and stifles the entire groups' academic discussion. There is nothing more frustrating than conducting a tutorial whereby one can sense that a student is inhibited in his discussion not because he does not know the law but because he does not know how to put it across.

The above state of affairs has also partially but not insignificantly, contributed to increasing polarisation among students - those who communicate effectively in English and those who do not. While these groups are not necessarily divided along ethnic lines, the fact that most of those who are from the rural background and therefore speak less English, are mainly Malays, means that the

majority in the second group are in fact Malays. While those with the ability to speak English get further and better exposure by being able to participate in students' activities which are conducted in English either at the National or International levels⁴² those in the other group either involve themselves only in activities in areas where proficiency in English is not required at all or may even choose not to participate in extra curricular activities at all.

This division between students conversant in and confident with, the English language and those who are not, is also to a certain extent reflected in their choice of optional subjects. As mentioned earlier, lectures for subjects taught by expatriates are conducted in English. While a summary lecture in Bahasa Malaysia is given by a local staff if the subject is a compulsory one, there is no such requirement for optional subjects. Hence students who consider themselves weak in English would naturally shy away from subjects offered by expatriates or subjects which

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Such as the Annual Inter-Varsity Moots Competition for the Ahmad Ibrahim Challenge Shield and the Philip C Jessup International Law Mooting Competition.

though offered by locals, do not have basic reading materials in Bahasa Malaysia or require extensive reading of English materials.⁴³

The schism continues even after the students graduate. Nationalistic sentiments do not always coincide with commercial realities. As far as the law graduates are concerned the two seem to be at cross purposes. While the government continues to insist that Bahasa Malaysia must be fully used in the legal and judicial fields, in the job market, both in the public and private sectors, it is a graduate's ability to speak English that gives him the edge over others. Those who may be fully conversant in Bahasa Malaysia but who lack confidence in English are generally less marketable.

E. THE ACHIEVEMENTS AND THE LESSONS

The Faculty of Law, University of Malaya can today, twenty years after it was first set up stand tall and claim that it has achieved one of its main objectives and contributed significantly to the wider usage of Bahasa

Malaysia in the courts particularly and in the judicial legal sector generally. While Malaysian legal literature in general and in Bahasa Malaysia in particular, is still in the early stages of development, the Faculty can also justifiably claim with pride that a significant proportion of the available Malaysian legal literature comes from one who is associated with the faculty - either as a student or a member of the academic staff or one who is both. The above achievements have also made the law and legal knowledge more accessible to the masses. The Faculty can rightly claim that it has by the above achievements laid the basic groundwork for the development of local law and perhaps more importantly, for an effective break from the colonial laws.

In spite of these achievements however, the Faculty is now being criticised because allegedly some of our graduates are not sufficiently conversant in English in particular and are lacking in confidence and analytical skill in general. Employers in both corporate and public sector seem to generally share this view.⁴⁴

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As part of its Curriculum Review, the Faculty had a series of panel discussions with members of the legal profession, judges, senior officers of the judicial and legal service and legal advisors in the corporate sectors, in 1991. In these discussion our graduates' lack of proficiency in English, and their lack of confidence were often mentioned.

Now where has the faculty gone wrong? Has it taken its task of encouraging the use of Bahasa Malaysia too seriously? Has its Bilingual policy failed? Have some of our graduates been penalised in the job market because the government's success in implementing the National Education Policy is further bolstered by the success of the Faculty in implementing the National Language Policy? Or is it because a National Language Policy that was first implemented in the early post-Merdeka years, is simply unsuitable or at least insufficient now as the country moves towards industrialisation and towards playing a more mature and pivotal role in the regional if not international arena?

It is submitted that each of the above are all contributory causes of the problem. When the Faculty first implemented its Bilingual policy, its students were mainly from the English stream. Hence a system whereby lectures were conducted in English and tutorials in Bahasa Malaysia worked well because the students being generally proficient in English were in fact learning the law in English. The lectures which were conducted in Bahasa Malaysia and the Bahasa Malaysia language classes (which the students who were already proficient in English had to attend) were seen as opportunities for learning something extra. Some of

these students were so conversant in both languages that while lectures were delivered in Bahasa Malaysia the notes were taken down in English because, they reasoned, almost all the other materials were in English.⁴⁵ Although examination questions were (and still are) in both languages, most preferred to answer in English. In short in the earlier years although the lectures were given in Bahasa Malaysia, the language of the law, the language in which the students thought about law was English. Hence the vast doors of legal knowledge were wide open to them.

However things naturally changed when the products of the National Education Policy entered the Faculty. Having studied all the subjects (except English) in the thirteen years of schooling in Bahasa Malaysia they came into the Faculty with the myopic idea that Bahasa Malaysia is an adequate tool of learning in all subjects and that English is just another subject. The situation is further aggravated by the declining standard of English in schools - regarded by many now with the benefit of hindsight, as one of the negative effects of the National Education Policy. While the requirement of a credit in English at a time when English was the medium of instruction in most

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Koid SL, 'Legal Education in Malaysia - A Critical Analysis' Unpublished Project Paper, Fac. of Law, UM 1987, pp 37-38.

schools was sufficient to ensure that undergraduates entering the law Faculty were sufficiently competent in the language, the requirement of a credit in English now is no longer a sufficient guarantee of the students' ability in the language for purposes of his studies at the Faculty of Law. But to require a higher standard of English for entry into the law school at a time when the standard of English in schools is declining is practically to close the doors of the Faculty to many otherwise eligible students.

Given the above mentioned factors, the Faculty cannot be wholly to blame for its alleged failure to produce graduates who are all truly bilingual. The Faculty is however at present taking various remedial measures within its means to arrest the problem. These include a long term programme to review its curriculum coupled with more immediate measures like reviewing its English language programmes and making students write regular short essays in English.

It is however felt that the above measures may not be adequate. This is because underlying all the problems faced by the Faculty in implementing its Bilingual Policy is the fact that the legal system of Malaysia and consequently the bulk of the law that is taught at the

Faculty is based on the common law if it is not the common law itself.

The experience of the Faculty of Law has shown that while the government has by the use of various constitutional and statutory instruments been generally successful in changing the language of the courts to the National Language; the language of the law and the legal system which is the English language, cannot be changed for as long as the common law remains in accordance with section 3 and 5 of the Civil Law Act 1956, the ultimate source of law in Malaysia. Changing merely the language of the court or the language in which the law is communicated will only adversely affect the education and training of the members of the legal profession. The effective implementation of the National Language Policy in the judicial legal field demands more than a mere translation of all the laws, even if that is possible. It must be complemented with a willingness and a commitment to break the very strong ties with the law of the colonial masters. There must be a commitment to develop a truly Malaysian legal system. In the words of an eminent academic:-⁴⁶

The obstacle of the English law remains formidable, as the long and ever increasing rows of English law reports confirms. While the speedy retrieval of case law is now possible with computerisation and new technology, the problem for Malaysia remains, and can only be resolved by a confrontation between English and Malaysian common law and a change in the structure of the legal profession itself.

A Malaysian judge was quoted to have said:-⁴⁷

Language is not the problem. It is the common law that poses the problem, the medium [of instruction] is immaterial. It is in using the common law, that is legal precedents and authorities that we will face difficulties. The language of the law is not the spoken language. It is that which is found in the reports. Using a particular language in court is not problematic. But we have to think of the law as separate from the language of the courts in this matter.

The common law has always been in English. As long as we are stuck with the common law system, we need English. This is because the language of the law is English and has always been English. If we remove that language we have to remove the common law system, then we have to follow another system.

That 'other system' that can replace the common law is a truly Malaysian Legal System.' But before such a system can effectively replace the common law it must be a self contained legal system. It requires a long and perhaps

⁴⁷ Voon Ah Kau, 'Bahasa Malaysia in the Malaysian Legal System' Unpublished Project Paper, Fac. of Law, UM. 1982.

difficult gestation period. During this period, all efforts must be geared towards this direction.

The Faculty of Law has provided the impetus for this not only by producing home grown lawyers but also by contributing towards the body of Malaysian Legal literature. To quote RH Hickling again:⁴⁸

[N]ow that an increasing number of Malaysian lawyers are educated in Malaysia, there is no need to look to England ... for inspiration. That inspiration is here within Malaysia in the spirit of the people. In the end the law for Malaysia must be purely Malaysian Law.

All branches of the government has a role to play. The Executive must regard the evolution of a Malaysian Legal System as the ultimate goal of the implementation of the National Language policy in the judicial and legal service. The time has come for politicians to stop using the National Language policy only for political mileage. The judiciary must help in developing legal Bahasa Malaysia by writing creative judgements in the language. Legal research and writing must be more aggressively promoted. Only when all these are carried out and when a truly

Malaysian Legal System is 'ready to see the world' can the tangled umbilical cords of S.3 and S.5 of the Civil Law 1956 be cut and an effective break be made from the common law.⁴⁹

CONFERENCE ON
EMERGING EDUCATIONAL OPPORTUNITIES FOR LAW
IN COMMONWEALTH AREA AND MALAYSIA:

The Implications for Legal Education

BACK TO THE COMMON LAW
THE LIMITS OF LAW AND THE
PROBLEMS OF THE COMMON LAW

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Of late suggestions have been made that Section 3 and 5 of the Civil Law Act ought either to be replaced or amended so as to provide for the application of the common law of Malaysia as decided by the courts in Malaysia, religious customs and practices of the parties and the general principle of law. Ahmad Ibrahim, 'Common Law in Malaysia', Kanun 1989 No. 1, Vol. 1, pp. 3-25.